IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

JOSEPH PERRO, GRAHAM CHARD AND BENJAMIN CHESTERO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 869

JOSEPH SERAO, CHARLES CAFARO and BENJAMIN GENETEMPO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of wilful failure to pay the special occupational tax imposed by 26 U.S.C. 4411 on persons who receive wagers on behalf of persons engaged in the business of accepting wagers, and with failing to register with the Internal Revenue official

in charge of their district as required by 26 U.S.C. 4412, in violation of 26 U.S.C. 7203. On January 11, 1966, petitioner Serao was sentenced to concurrent terms of imprisonment of six months on each count; petitioner Cafaro to concurrent terms of one year; and petitioner Genetempo to concurrent terms of one year and a $5,000 fine. The court of appeals affirmed (Pet. App. 15-22).

1. Although the issue was apparently not raised in the district court, petitioners challenge the constitutionality under the Fifth Amendment of the statutes under which they were convicted. Since that issue is presently before this Court in *Marchetti* v. *United States*, No. 38, this Term, we suggest that it would be appropriate to defer action on the petition until decision by this Court in that case.

2. Petitioners Cafaro and Genetempo also challenge the validity of an affidavit supporting a warrant for the search of premises at 327 W. 87th Street. The sufficiency of the affidavit was upheld by the district court and the court of appeals, and presents no issue warranting review by this Court.

On March 21, 1963, an Internal Revenue Service Agent named Ostrager swore out four affidavits before a United States Commissioner in support of warrants to search four apartments believed to be used in accepting wagers and keeping records thereof without paying the required tax (A. 9a-24a).[1] The affidavits relating to three of the apartments, identical in form, stated that the affiant had reason to believe that gam-

[1] "A." refers to appellants' appendix in the court of appeals.

bling paraphernalia being used in the illicit business of accepting wagers was being concealed on the premises.[2] The grounds for that belief were set forth as follows:

> [T]estimony of Special Agents of the Internal Revenue Service:
>
> 1. Who placed wagers at telephone number * * *.
> 2. That the aforesaid telephone number was supplied to a Special Agent by an individual known as Joe Carroll[3] for the purposes of placing wagers.
> 3. That investigation has disclosed that telephone number * * * is installed at [the premises desired to be searched] * * *.
> 4. That a search of the records of the Internal Revenue Service revealed that neither the person known as Joe Carroll nor any other person * * * had paid the special tax imposed by 26 U.S.C. § 4411.

The affidavit with relation to the apartment at 327 W. 87th Street—the one challenged here—recited:

> And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: testimony of Special Agents of the Internal Revenue Service: 1. Who have placed wagers by telephone at 3 different locations hereinafter referred to as wirerooms, with an individual known as Joe Carroll. 2. Who observed said Joe Carroll on 4 occasions proceeding

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[2] The addresses and telephone numbers of the premises described were different.

[3] Joe Carroll was the assumed name of petitioner Serao.

> from the aforesaid wirerooms to the premises at 327 West 87th St. 3. Who observed 2 unknown individuals leaving 2 different wirerooms [sic] premises and who were on several occasions observed entering the premises at 327 West 87th St. 4. That Joe Carroll was observed inside Apt. B at 327 West 87th St. 5. That a search of the records of the Internal Revenue Service reveal [sic] that the said Joe Carroll has not paid the special tax imposed by 26 U.S.C. § 4411.

Petitioners Cafaro and Genetempo claim that the allegation in the affidavit that Joe Carroll and two "unknown individuals" went to the W. 87th St. apartment after leaving one or other of the wire rooms did not establish probable cause to believe that these visits bore any relation to illegal activities occurring at the searched premises.[4] However, as the court of appeals held, the Commissioner could quite reasonably infer that the trips of Carroll and the two unknown individuals between the wire rooms and the

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[4] The evidence at trial, which is not at issue, showed that one Brown, a United States Treasury Intelligence Agent, placed bets with Serao (the latter using the name Joe Carroll) and also called in bets to telephone numbers (given to him by Serao) located in three "wire room" apartments (Pet. App. 16). It is conceded by Serao that if the federal wagering tax statutes are constitutional, his conviction must stand (Pet. 5). Gambling paraphernalia linking Cafaro and Genetempo to the unlawful betting activity was found at the "tally room" at 327 W. 87th St. (*i.e.*, the place where records of bets were kept) as a result of the search there conducted (A. 10a). Cafaro and Genetempo were, under fictitious names, the lessees, respectively, of one of the wire rooms and the tally room. Cafaro was observed carrying brown paper bags to the 87th St. apartment (Pet. App. 16-17).

searched apartment were in connection with wire room business. Moreover, the Commissioner could properly look to the other affidavits filed simultaneously with the one in question in considering whether probable cause existed that the W. 87th St. apartment was involved in an illegal betting operation. See *United States* v. *Markis*, 352 F. 2d 860, 864 (C.A. 2).[5] These affidavits strengthened the basis for belief that the W. 87th St. apartment was involved in the gambling operation by supporting the assertion in the affidavit in question that Carroll, who had been seen proceeding from the wire rooms to the 87th St. premises, had supplied a federal agent with telephone numbers at three different wire room locations for the purpose of placing bets.

Petitioners also contend that the affidavits unreasonably presupposed knowledge by the United States Commissioner of the relationship in gambling enterprises between "wire" rooms and "tally" rooms (Pet. 10). However, no such particular knowledge was either presumed or was necessary. The Commissioner had merely to infer that the W. 87th St. apartment was linked with the wire rooms (sufficiently described as places to which bets were telephoned) as part of an illegal gambling operation. The affidavit to search the 87th St. apartment, taken either alone

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[5] Petitioners do not argue to the contrary (see Pet. 9-10). Indeed, as the court of appeals found, (Pet. App. 20) a contrary holding would represent a "hypertechnical" rather than a commonsense approach to the question of probable cause and would thus be at odds with *United States* v. *Ventresca*, 380 U.S. 102, 109.

or in conjunction with the affidavits submitted in relation to the wire room apartments, contained sufficient facts to enable him to make that determination.

It is therefore respectfully submitted that, as to this issue, the petition for a writ of certiorari should be denied.

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JANUARY 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 243278 528